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Supreme Court, U.S.
FILED
09-64 JUL 14 2009
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL GEORGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Dated: July 13, 2009

QUESTIONS PRESENTED

I. Where, on direct appeal, the First Circuit explicitly did not rule on petitioner's ineffective counsel claim by noting that such claims should be left for development on a 2255 motion, can the District Court, on that later-filed 2255 motion, deny relief because the First Circuit had already rejected the argument?

II. Did the District Court misread this Court's prior rulings when it considered trial counsel's failure to develop and press a defense as a "strategic choice" to which courts are "highly deferential," when there were facts to support it, and trial counsel has affirmed that "it is not correct that we made a tactical decision not to present [the] defense"?

III. Should the District Court have dismissed the ineffective counsel motion without conducting a hearing (which petitioner requested) to determine exactly what evidence had been overlooked by trial counsel supporting the defense, by relying on the First Circuit's conclusion on direct appeal, where the record on that appeal did not have sufficient evidence of the defense because none was offered during trial -- the precise point made in this 2255 proceeding?

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CONSTITUTIONAL PROVISIONS, CODES AND RULES:

United States Constitution

Sixth Amendment 1

United States Code

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28 U.S.C § 2255..... 1, *passim*

OPINIONS BELOW

The judgment of the Court of Appeals for the First Circuit Court of Appeals denying petitioner's Motion for a Certificate of Appealability in relation to the District Court decision is reproduced at the Appendix ("App.") at App. 1a - 2a. The District Court published decision denying petitioner's motion to vacate his conviction under 28 U.S.C. §2255 is reproduced at App. 3a – 12a.

JURISDICTION OF THIS COURT

The decision of the Court of Appeals denying petitioner's motion for a Certificate of Appealability was entered on April 16, 2009. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part that

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Title 28 U.S.C. §2255 provides that

> A prisoner in custody under sentence of a court established by Act of Congress

> claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Title 26 U.S.C. § 501 (a) and (c) (4) provides

(a) Exemption from taxation.--An organization described in subsection (c) . . . (4) shall be exempt from taxation under this subtitle . . .

> (4) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare . . .

STATEMENT OF THE CASE

The Initial Conviction

The Daniel George was convicted of evading taxes owed on money generated from the distribution of his patented, nutritional supplements. The jury found that the money raised had been income and that George had willfully evaded taxes thereon. In this post-direct-appeal, 2255 proceeding, George has contended that there were obvious facts supporting a

complete defense to the tax evasion charges which should have been, but which were not, considered by his trial counsel nor developed at his trial.

The overlooked defense was that George was operating a tax-exempt organization and thus that the income was tax-exempt, not the stuff of tax evasion. This would have been a defense had it been credited by the jury on proper jury instructions. Yet, neither the District Court itself, the prosecutor, nor defense counsel mentioned, much less made factual inquiry concerning, this defense. This, despite the fact that it virtually hovered over the trial – with the trial judge herself having asked, pre-trial, whether there was evidence supporting "any other nontaxable explanation for the payments made to him [George]. . ." (Pretrial Transcript dated 5/5/04, p. 25) Counsel did not take this cue that was dropped in his lap,[1] even though the IRS case agent testified at trial *that even a lay grand juror had "asked if he [George] was a 501(c)(3) [tax exempt] organization." (Trial Transcript Vol. 5, p. 84).* The prosecutor likewise never raised the issue. Neither did the trial judge pursue it further, after initially raising the matter.

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[1] Trial counsel admits he never spotted the 501(c)(4) issue. As the district court noted, he has filed a declaration stating that "it is not correct that we made a tactical decision not to present §501(c)(4) as a defense . . . ." Order, p. 5.[1] He simply missed the issue.

The Direct Appeal

On his direct appeal after conviction, George raised the tax-exempt- income defense, pointed to all the facts in the record that literally shouted out for the need to develop that defense, and to instruct the jury on it. He argued that, even from just the facts in the trial record pointing at this defense, it was plain error for the judge not to instruct on it. S*omebody* - the judge, the defense lawyer, or the prosecutor – should have spotted and explored it, George argued. As the First Circuit characterized the plain error point:

> George argues that the district court plainly erred in failing to instruct the jury *sua sponte* about § 501(c)(4) because evidence at trial made the applicability of a defense based upon this statute "obvious." George asserts that such an instruction would have resulted in an acquittal because George was "obviously" running a non-profit scientific foundation, and sales by such an entity are exempt from federal taxation. The absence of a § 501(c)(4) instruction was especially harmful, George says, because the district court inaccurately instructed the jury that George's income was either taxable sales income or a product of tax-exempt gifts and donations.

United States v. George, 448 F.3d 96, 99-100 (1st Cir. 2009) The First Circuit held that on the record before the trial court, it was not plain error. *Id.* As to

George's argument that if not the trial judge, then the prosecutor or the defense lawyer should have considered the defense, the First Circuit commented (448 F.3d at 99, n. 5):

> George's brief hints at additional due process arguments but fails to develop them sufficiently to warrant further mention. *Citation omitted.* George also criticizes trial counsel's performance, *but fact-specific claims of ineffective assistance of counsel must be pursued via 28 U.S.C. § 2255.*

The 2255 Proceeding

Given the plain invitation to do so contained in the First Circuit language just quoted, on August 22, 2007, George made a timely motion under section 2255 to have his conviction set aside on the ground that his trial attorney had been ineffective by failing to present evidence to support a defense that George's activities and the money generated thereby were tax exempt as being part of a tax-exempt, social welfare organization under 26 U.S.C. § 501(c)(4). In his 2255 motion papers filed with this Court, George filed an affidavit that, while detailed, showed just some of the evidence supporting his 2255 motion. He asked for a hearing to show that (1) the defense was obviously worth pursuing based on what was known to defense counsel at the time, and (2) had the defense been fully developed by what a hearing would have shown to be available and provable by testimony of witnesses and documents that could

have been presented at the trial, this defense may well have altered the outcome of the trial. *See*, *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). *See*, George's Petition to Vacate His Sentence (Dist. Ct. Docket No. 1), Part 1, pp. 12 and 20, and Part 2, p. 14. *See also*, George's Reply (Docket No. 8, p. 7, note 2), reiterating the specific request for an evidentiary hearing made in George's initial moving papers and summarizing what could have been shown at the trial.

The District Court denied the 2255 motion. First, it noted that the "First Circuit affirmed . . . finding that there was insufficient evidence at trial to warrant such an instruction." App, 3b. In so holding, the District Court made no mention of the fact that this First Circuit had refused to rule on the 2255 claim, nor acknowledge, much less discuss, the fact that the petition 2255 raised (by sworn declaration of George) many 501(c)(4) facts not present in the trial record. The very point of the 2255 was that these facts were not, but should have been, in the trial record had his trial lawyer pursued the defense.

Next, in language completely at odds with a long line of cases holding otherwise, the district court insulated the failure of defense counsel to pursue the defense by the following misinterpretation of *Strickland, supra*, 446 U.S. at 689:

> Review of trial counsel's performance is "highly deferential" and subject to "a strong

> presumption that counsel's conduct falls within the wide range of reasonable professional assistance."

(App, 3b) As shown below, the deference give to tactical choices made during trial is not at all applicable to a failure to consider a defense, a failure which defense counsel admitted in this case. Tactical choices to which deference is given involves weighing the options, not missing one altogether.

Finally, the district court completely ignored the specific request in George's 2255 for an evidentiary hearing at which witnesses and documents could be presented supporting George's affidavit that there was indeed evidence available to trial counsel that would have raised the tax-exempt defense so that the jury should have been instructed on it. This denial came in spite of *Strickland's* language that such hearings are needed in these cases, which is why this Court stated its strong preference for delay of any ineffective counsel claim until such a hearing can be had to augment the record, *i.e.*, in a 2255 proceeding. *See*, *Massaro v. United States*, 538 U.S. 500 (2003).

The Motion for a Certificate of Appealability ("COA")

After the 2255 petition was denied by the trial judge, George sought a COA. The district court first granted it, and then, on motion for reconsideration, denied it. (Dist. Doc. No. 22). George's motion for a

COA was denied by the First Circuit on April 16, 2009.

This petition follows because we contend that reasonable jurists could differ on whether to District Court erred in denying the 2255 motion in the manner described above. *See, Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

The Tax Charges and Petitioner George

Before George's trial, the district court summarized the tax charges on which George was ultimately found guilty: (Crim. Doc. Order, 4/6/04):

> The indictment alleges the following facts. The defendant operated a business that manufactured, sold and analyzed mineral and herb products. Between January 1, 1996 and December 31, 1999, he deposited $460,000 in business receipts into bank accounts at various financial institutions in Massachusetts and earned $470,000 in interest income. Although the defendant had taxable income of over $800,000 during the four-year period, he did not file tax returns and paid no taxes.

George was convicted on jury instructions that defined income as earnings from sales, but which did *not* instruct the jury that income which was tax exempt was not taxable and thus could not form the basis of tax evasion.

According to the district court, appellant George was "brilliant," (A 171) "adored" (A 179),[2] "you obviously have a gift" (A 217) and "was essentially like a medicine man" (A 178), and was "the kind of guy described as one of these odd geniuses." (A 214) For years, "he helped a lot of people" (A 31-32) through his dissemination of information about how to lead a healthier life and his development of nutritional supplements which he disseminated throughout the community. George "has dedicated his life to the treatment of diseases responsible for enormous amounts of suffering in the lives of individuals, their families, and society at large." (A 283)

Even after George was convicted of tax evasion on sales of nutritional supplements he had developed, and the district court had noted that he "was making $6,000,000.00 by selling medicine," (A 179), the court seemed puzzled:

> You have to admit something really odd here. You have a guy sitting with $6 million in his bank, living like a pauper in the Spartan shack in Rockport on SSDI benefits. I mean it's odd.
>
> ***

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[2] "A" means the direct appeal Joint Appendix which, along with any other appropriate part of the record will be presented in suitable form if this petition is granted.

> . . . there is . . . no easy explanation as to why he is holding on to the $6 million, other than he thinks he doesn't have to pay Uncle Sam because he is going to put it in his foundation.

(A 210) Actually, there *was* an easy – and exculpatory – explanation, had the clear meaning of §501(c)(4) and several other prominent sections of the tax code been applied.

501(c)(4) Raised a Substantial Defense

> 26 U.S.C. §501(c) and (4) exempt from taxation various groups:
>
> (4)Civic leagues or *organizations not organized for profit but operated exclusively for the promotion of social welfare . . .*

(emphasis added) No Permission or licenses is needed from the IRS to be tax exempt under this code provision.

"Social welfare organizations" under (c)(4) are defined broadly as "organizations engaged in promoting the welfare of mankind." *Debs Memorial Radio Fund v. C.I.R.*, 148 F.2d 948, 951 (2d Cir. 1945):

> In this context [501(c)(4)] 'social' is defined as: 'Concerned with, interested in, the constitution of society and the problems presented (thereby) * * *'. Oxford Dictionary,

> supra, Vol. IX. . . . . 'Welfare' means 'Well-being (of a person, community, or thing).' Id., Vol. XII. In short, 'social welfare' is the well-being of persons as a community.
>
> *C.I.R. v. Lake Forrest, Inc.*, 305 F.2d 814, 818 (4th Cir. 1962).

George's organization surely fits within the broad concept of community which "functions within a broader national fabric." *Flat Top Lake Association v. United States*, 868 F.2d 108 (9th Cir. 1989). George's organization just as surely seeks the "betterment of mankind," the operative test in *People's Educational Camp,* 331 F.2d 923, 930 (2d Cir. 1964). His efforts to educate the public on better living through better diet, and through the use of healthful food supplements, are surely aimed at the "well-being" of society. His organization is thus "concerned with, interested in . . . problems presented by society," the test in *Lake Forrest, Inc., supra,* 305 F.2d 814 at 818. Or, as the District Court itself noted, George's organization "helped a lot of people" and "has accolades from all these people."

George's treatment of the money raised also met the requirement of 501(c)(4)(B) that "no part of the net earnings of such entity inures to the benefit of any private shareholder or individual." The district court itself noted that George held "the $6 million in his bank, living like a pauper in the Spartan shack in Rockport on SSDI benefits." (A 210) It also concluded that there was "no easy explanation

as to why he is holding on to the $6 million, other than he thinks he doesn't have to pay Uncle Sam because he is going to put it his foundation." *Id.* This shows that George's treatment of the money was as required under §501(c)(4).

Hence a substantial defense was available.

Pre-Trial Colloquy Literally Stage-Whispered the 501(c)(4) Defense

At the first hearing in George's criminal case, this Court told the prosecutor: "I know abysmally little about the tax code" (Tr. 4/27/04, p. 5), and asked that he "tell me [the court] a little about your [the government's] case" (*Id.*, p. 3) and "the likely defense?" (*Id.*, p.4) The prosecutor responded incompletely limiting the possibilities to either gifts, or income:

> THE PROSECUTOR: In essence, the defendant is charged with having failed to report income that he received in connection with a business that he ran out of his house. In a nutshell, the business involved the sale of nutritional supplements, herbs, minerals, that were used by the companies that were selling health food products.
>
> THE COURT: And what is the likely defense?

> THE PROSECUTOR: . . . He is asserting that the monies did not constitute payment for product delivered for services rendered. Rather they constituted charitable donations given to him by various benefactors.

(Tr. 4/27/2004, pp. 4-6)

Defense counsel said nothing. Having posited two possibilities (sales or gifts), the prosecutor did not mention the third alternative that was plainly available under the facts and the law, that may well have exonerated George, namely, that the payments made for the nutritional supplements were *neither* gifts *nor* taxable sales, but were instead *non-taxable* sales related to the activity of a social welfare organization under §501(c)(4).

The Court itself raised the tax-exempt issue as follows:

> HE COURT: And if they [the proceeds] were truly gifts or charitable contributions, what was he supposed to do with them? Anything? Did he have to report them in any way?
>
> PROSECUTOR: It depends, Your Honor, on whether he's characterizing himself as operating a 501C3 organization or not. If he is, he has certain filing requirements to be recognized as a 501C3. That's probably most

> relevant to whether or not the contributors are allowed to deduct it themselves.

(Tr. 4/27/04, p.6)

While pre-filing with the IRS is required for recognition as a §501(c)(3) organization, *there is no pre-filing requirement for recognition under §501(c)(4)* organization. Section 508 specifically singles out §501(c)(3) for a filing requirement by providing that "new organizations must notify the secretary that they are applying for recognition of §501(c)(3) tax status." Not §501(c)(4). Section 170(a) likewise preserves the distinction by providing that "there shall be allowed a deduction of any charitable contribution as defined in subsection (c)." Subsection (c) includes §501(c)(3) organizations, but not §501(c)(4) organizations. *See,* §170(c)(2)(B)-(D).

Even more revealing is the fact that the application for a §501(c)(3) tax exemption (IRS Form 1023) itself specifically makes the distinction that the prosecutor made in open Court. This form was admitted into evidence at George's trial (Trial Exhibit 113) and provides certain timing requirements which, if not met, preclude retroactive exempt status. For applications filed too late to achieve retroactive benefits, the Form 1023 reads:

> . . . your exemption under 501(c)(3) will be effective from the date you filed your application. . . . you may nevertheless qualify for tax exemption as an organization described

> in section 510(c)(4) from the date you were legally formed and ending with the date you are recognized under section 501(c)(3). *Generally, contributions made to section 501(c)(4) organizations are not tax deductible.*

The 501(c)(4) defense was obviously possible from what was being bandied about before and during the trial. Indeed even a lay person asked about tax exemption. As the IRS case agent testified at trial, that a grand juror had "asked if he [George] was a §501(c)(3) organization." (Tr. Vol. 5, p. 84) If the tax-exempt organization question was spotted by a lay grand juror, it simply must also have been spotted by the lawyer representing the defendant, even had there not been s specific question put by the judge as to whether there was any "non-taxable explanation" for the income, and even had there not been all the pre-trial discussion about why section 501(c)(3) did not apply. 501(c)(4) is, after all, the sentence just after 501(c)(3) in the code.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts with Two Prior Decisions of this Court

The District Court decision is published. See, *George v. United States*, 550 F.Supp.2d 188 (D.Mass. 2008). It is plainly at odds with the two decisions most important to the resolution of habeas petitions brought under 28 U.S.C. §2255, namely, *Massaro, supra,* 538 U.S. 500; and *Strickland v. Washington*,

supra, 466 U.S. 668. Indeed, as shown further below, it conflicts with Strickland in two respects and with many cases following *Strickland.*

The Massaro Decision Was Ignored

In *Massaro, supra*, 538 U.S. 500, this Court clarified its preference that ineffective counsel claims be brought through a §2255 motion rather than on direct appeal. In doing so it rejected the use of lose approach that had previously been in effect whereby counsel on the direct appeal had to raise incompletely developed ineffective counsel claims or risk losing them. It did so precisely for reasons shown quite valid by what occurred in this case.

On George's direct appeal, the First Circuit could not rule on whether the overlooked defense may have altered the outcome, since the record was not developed and such development had to await a later 2255 proceeding. Yet when George later brought that 2255 proceeding, the District Court cited the refusal of the earlier First Circuit to rule on that claim as having actually been a decision on that claim, i.e., that he had not shown that the defense could have been viable at trial.

That ruling is at odds with how all courts have interpreted *Massaro*, which states: "the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial," (*See id.* at 508). *See, George, supra*, 448 F.3d at 99, n. 5 ("fact-specific claims of

ineffective assistance of counsel must be pursued via 28 U.S.C. § 2255."); *see also, U.S. v. Gaskin*, 364 F.3d 438, 468 (2d Cir. 2004). ("This court is generally disinclined to resolve ineffective assistance claims on direct review.")

If the District Court's ruling is allowed to stand, it will replant the prior uncertainty counsel had faced before *Massaro* clarified the matter.

Failing to Raise 501(c)(4) Was Not a "Strategic Choice"

George's trial counsel did not choose to reject the 501(c)(4) defense as part of some tactic to be given high deference under *Strickland*. He missed it, as he said in an affidavit. "It is not correct that we made a tactical decision not to present §501(c)(4) as a defense . . . ." (App, 5b). Only reasoned choices are insulated after "thorough investigation of the law," *Strickland, supra*, 466 U.S. at 691. Until such investigations occur, no strategic choice can be made that is provided any deference. This is settled law and at odds with the deference given below:

> . . . we judge the reasonableness of the purported "strategic decision" on the part of defense counsel "*in terms of the adequacy of the investigations supporting*" it. *Wiggins, supra*, 539 U.S. at 521, 123 S.Ct. 252 . . . . this is not a case where counsel made a reasonable decision to cease further investigation . . . Because counsel *never*

> *investigated that alternative approach at all, counsel did not have any reasoned basis to conclude that such an approach would be fruitless* - and, in fact, subsequent counsel have found it quite fruitful.

Gerston v. Senkowski, 426 F.3d 588, 610-11 (2d Cir. 2005) (emphasis added). Moreover:

> Defense counsel may not fail to conduct an investigation and then rely on the resulting ignorance to excuse his failure to explore a strategy that would likely have yielded exculpatory evidence . . . .

In George's case, defense counsel admittedly failed to investigate whether there was any defense from the first pretrial hearing when he was asked by the Court to "tell me [the court] a little about your [the government's] case" (*Id.*, p. 3) and "the likely defense." (*Id.*, p.4)

The Denial of a Hearing Also Ignores *Strickland*

George asked for a hearing on his 2255 motion, twice. *See*, George's Petition to Vacate His Sentence, Docket No. 1, Part 1, pp. 12 and 20, and Part 2, p. 14. *See also*, George's Reply, Docket No. 8, p. 7, note 2. Unless the papers filed by George show conclusively that he is entitled to no relief, Section 2255 mandates that the Court "grant a prompt hearing thereon, determine the issues and make

findings of fact and conclusions of law with respect thereto." This Court need not, on this hearing issue, go beyond the teaching of *Strickland, supra*:

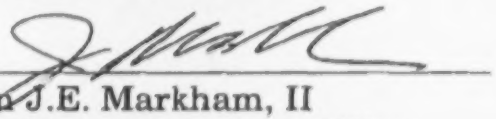
> . . . strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. *In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.* In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances . . .
>
> In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

Strickland, supra, 466 U.S. 690-91. *See also, Massaro, supra*, and cases noting the need and "the benefit of district court fact finding." *U.S. v. Levy*, 377 F.3d 259, 265 (2d Cir. 2004).

CONCLUSION

This Petition should be granted.

Respectfully submitted
MARKHAM & READ

By: 

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APPENDIX A

Judgment of the United States Court of Appeals for the First Circuit, Dated April 16, 2009 . . . . . 1a

APPENDIX B

Order and Opinion of the United States District Court for the District of Massachusetts, dated April 9, 2008 . . . . . .3a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 08-1652

DANIEL H. GEORGE, JR.,

Petitioner, Appellant,

v.

UNITED STATES OF AMERICA,

Respondent, Appellee.

Before

Lynch, Chief Judge,
Boudin and Howard, Circuit Judges.

JUDGMENT
Entered: April 16, 2009

Daniel H. George, Jr. was convicted of tax evasion after a jury trial in the United States District Court for the District of Massachusetts, and this court affirmed his conviction on direct appeal. See United States v. George, 448 F.3d 96 (1 st Cir. 2006). George now seeks leave to appeal from the district court's denial of his motion to vacate his conviction under 28 U.S.C. § 2255. See George v.

United States, 550 F.Supp.2d 188 (D.Mass. 2008). Having carefully reviewed the underlying district court record and having found nothing reasonably debatable about the district court's rejection of the claims that George seeks to leave to press on appeal, see Miller-El v. Cockrell, 537 U.S. 322, 337 (2003) (stating the applicable standard), we deny his application for a certificate of appealability and terminate the appeal.

By the Court:

/s/ Richard Cushing Donovan, Clerk.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DANIEL H. GEORGE, JR. Petitioner,	)	CIVIL ACTION NO. 07-11568-PBR
v.	)	
UNITED STATES OF AMERICA, Respondent.	)	

MEMORANDUM AND ORDER

April 9, 2008

Saris, U.S.D.J.

I. INTRODUCTION

Petitioner Daniel H. George, Jr., convicted of tax evasion, moves pursuant to 28 U.S.C. § 2255 to vacate his conviction on the ground of ineffective assistance of counsel. His petition is **DENIED**.

II. BACKGROUND

George, a self-taught chemist, researched, developed and sold a series of nutritional

supplements out of his home in Rockport, Massachusetts and through partnerships with various companies. He holds four patents. In 2003, he was indicted on four counts of tax evasion for the years 1996, 1997, 1998 and 1999 for his failure to pay taxes on over $800,000 of income he earned through sales of his products and interest income he earned on account balances. His primary defense was that the monies he received constituted charitable donations given to him by various benefactors and that he believed that such monies were not taxable. On May 18, 2004, a jury found George guilty on four counts of tax evasion. The evidence at trial showed that George "ultimately accumulated over six million dollars in various bank accounts." United States v. George, 448 F.3d 96, 98 (1st Cir. 2006). The district court sentenced George to thirty months of incarceration and thirty-six months of supervised release.

George subsequently filed a motion for a new trial alleging, *inter alia*, that evidence discovered post-trial weakened the government's showing as to the element involving an affirmative act of evasion. Specifically, George submitted decades-old documents from the Social Security Administration and Bureau of Prisons that contained transpositions of his social security number. He argued that this evidence showed that the use of erroneous social security numbers in connection with his business bank accounts was an innocent error and not the affirmative act of evasion the government contended

t had been. The district court denied George's motion, and George appealed. The First Circuit affirmed, agreeing with the district court that the "new evidence creates no realistic likelihood of acquittal." George, 448 F.3d at 101-02.

In his appeal, George also argued that the court erred by failing to instruct the jury *sua sponte* about a defense based on 26 U.S.C. §501(c)(4), which exempts from taxation "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare." 26 U.S.C. §501(c)(4)(A). George argued on appeal that, during the years in question, he "was 'obviously' running a non-profit scientific foundation," and thus entitled to exemption, because "sales by such an entity are exempt from federal taxation." George, 448 F.3d at 100. The First Circuit affirmed the conviction, finding no error in the failure to instruct since George had never requested such an instruction, the instruction was contrary to the defense's theory at trial, and, in any event, there was insufficient evidence produced at trial to warrant such an instruction. See id. at 100-01.

Released from custody on June 15, 2007, George is on supervised release. On August 22, 2007, George timely filed a petition under 28 U.S.C. § 2255 to vacate his judgment, alleging ineffective assistance of trial counsel in violation of the Sixth Amendment.

III. DISCUSSION

Petitioner George brings this § 2255 petition alleging a Sixth Amendment violation for ineffective assistance of counsel. To succeed on an ineffective assistance claim, the petitioner must establish that (1) counsel's representation fell below "an objective standard of reasonableness," and (2) a reasonable probability exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." United States v. De La Cruz, 514 F.3d 121, 140 (1st Cir. 2008) (citing Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 446 U.S. at 694. Review of trial counsel's performance is "highly deferential" and subject to "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689. "[T]he Constitution pledges to an accused an effective defense, not necessarily a perfect defense or a successful defense." Scarpa v. DuBois, 38 F.3d 1, 8 (1st Cir. 1994). Indeed, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689.

Section 501(c)(4) Claim

George's ineffective assistance claim rests primarily on the failure of his trial counsel to argue a specific defense theory based on § 501(c)(4). At trial,

defense counsel argued that the payments were gifts or donations to George's foundation. His defense counsel

> painted George as a reclusive and eccentric genius, emphasizing that he lived as a pauper in a small house supported only by Social Security disability payments of approximately $9,000 a year. The defense called attention to the fact that George had never used any of the supplement proceeds for himself, but had saved the money with the goal of building a non-profit research foundation. Finally, the defense highlighted the fact that, following his indictment, George had established the Biogenesis Foundation, Inc., which received tax-exempt status from the IRS under 26 U.S.C. § 501(c)(3).

George, 448 F.3d at 98-99. Unfortunately for the defense, at trial, "the government called several of George's clients, who testified that they had paid for products or services and that their payments were not gifts or donations." Id. at 98.

George argues that his attorney should have raised a defense under § 501(c)(4), because even if the payments were bona fide sales, and not gifts, income from those sales is exempt for a § 501(c)(4) entity. In George's view, there is no pre-filing requirement for Internal Revenue Service (IRS) recognition of tax exemption under § 501(c)(4),

whereas there is such a requirement under § 501(c)(3). As such, the income from sales would not be taxable. This theory is consistent with the witnesses' testimony that they did not intend to donate to a foundation, but instead intended to purchase nutritional supplements. In a post-trial submission, the trial defense attorney stated, "[i]t is not correct that we made a tactical decision not to present § 501(c)(4) as a potential defense. . . . I do not see it as necessarily inconsistent with the defense I presented at trial." (Rehnquist Decl.¶ 4.)

In a recent submission, George contends that during the years in question, he operated a "de facto non-profit organization" and marketed his non-profit, *inter alia*, through websites "constructed to spread the word of my nutritional supplements." (Pet'r Aff. ¶ 7-8.) In addition, he undertook research and development by arranging the "distribut[ion] [of] the nutritional supplements to the public for the purpose of testing the products and getting feedback. . . with respect to the effectiveness of the products and the refinement of the technology for their production and consumption." (Pet'r Aff.¶ 8.) Finally, George entered into strategic partnerships with at least three individuals who headed for–profit nutrition-related companies. (Pet'r Aff. ¶ 8). He states that he worked with others to "educate the public about personal and environmental health." (Pet'r Aff. ¶7). George also contends that his business income was earmarked to build a laboratory to carry on his "humanitarian work." (Pet'r Aff. ¶ 9.) On or

about July 8, 2003, he submitted his Application for Recognition of Exemption for the Biogenesis Foundation, Inc. under Section 501(c)(3) of the Internal Revenue Code. (Connolly Decl. ¶ 2.) The Articles of Organization for the Biogenesis Foundation, Inc. were filed with the Commonwealth on or about May 14, 2003. (Connolly Decl. ¶ 2.)

Generally speaking, to qualify for tax exemption under § 501(c)(4), an applicant must establish that there is "(1) an organization, that (2) is not operated for profit, and that is (3) operated exclusively for the promotion of social welfare." George, 448 F.3d at 100; see 26 U.S.C. § 501(c)(4)(A). In addition, § 501(c)(4)(A) does not apply to an entity "unless no part of the net earnings of such entity inures to the benefit of any private shareholder or individual." Id. § 501(c)(4)(B). "An organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community."
26 C.F.R. § 1.501(c)(4)-1(a)(2)(I). According to the IRS instructions to the Application for Recognition of Exemption under Section 501(c)(3), "you may, nevertheless, qualify for tax exemption as an organization described in section 501(c)(4) for the period beginning with the date you were legally formed and ending with the date you are recognized under section 501(c)(3)" (emphasis added).

The problem with George's new assault on the

verdict is that there is scant evidence that a social welfare organization had been "legally formed" during the tax years in question (1996-1999).1 George insists that he was operating in a manner consistent with that of a §501(c)(4) social welfare organization, and he was squirreling away income for multiple years with the goal of eventually forming an organization. However, as the First Circuit pointed out, "the evidence suggests that George did not operate an 'organization,' given that he failed to engage in any traditional business behavior, such as maintaining records, hiring employees, or maintaining a formal office." George, 448 F.3d.at 101. "That George may have intended to place these proceeds into a tax-exempt organization at some future point does not alter the fact that they were business profits available for his use." Id.

Moreover, it bears pointing out that George had stated to the IRS "that all the monies that he had received were 'gifts' or 'donations' from his patrons, who supported his goal of building a non-profit research laboratory." George, 448 F.3d at 98. It is little wonder defense counsel argued that these monies were gifts, as that was precisely what George told the IRS. Accordingly, Petitioner has not shown ineffective assistance of counsel based on the strategy of arguing that the money paid for the

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1 Unfortunately, the government has provided the Court with little guidance on the legal pre-requisites for tax-exemption under § 501(c)(4).

supplements should be deemed contributions.

Even if counsel were ineffective for not arguing that the money was tax-exempt income rather than a gift, George's ipse dixit that the money would be used for a social welfare purpose does not demonstrate a reasonable likelihood of acquittal if his attorney had raised the § 501(c)(4) defense. Because he cannot show cause or prejudice, as required, his ineffective assistance claim fails.

The Social Security Numbers

George once again argues that the documents he submitted post-trial undermine the government's case as to affirmative evasion. In general, "issues that have been raised and decided on a motion for a new trial cannot be reconsidered in a subsequent collateral attack." Tracey v. United States, 739 F.2d 679, 682 (1st Cir.1984) (internal quotation marks omitted). On appeal from the denial of George's motion for a new trial, the First Circuit considered and rejected the very argument that George raises here, stating that his new evidence "creates no realistic likelihood of acquittal." George, 448 F.3d at 102. Thus, George would fail on the prejudice prong of the Strickland test. See Strickland, 446 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.").

IV. ORDER

George's petition is **DENIED**.

S/PATTI B. SARIS
United States District Judge